Missouri Medical Malpractice Joint Underwriting Association

Minutes for the Meeting of February 11, 2004

Location: Room 750 of the Truman State Office Building
Jefferson City, Missouri Department of Insurance
Time: 10:00 a.m. to 4:30 p.m.

Attending:
(Board)
Bill Turley, Chairman [Shelter Insurance Companies/NAII][*]
Don Ainsworth [Safety Nat'l Casualty Corp./ the Alliance]
Paul Blume (*via teleconference*) [AIG/Unaffiliated Companies]
Craig Kjellberg (*via teleconference*) [State Farm Ins./Unaffiliated Cos.]
Karl Koch [Savers Property & Casualty Ins. Co./the Alliance]
Dave Monaghan [American Family Insurance/NAII]
Dennis Smith [Missouri Employers Mutual/AIA]
Patty Williamson [Uhlemeyer Services Inc./AIA]

(MDI Staff)
Scott B. Lakin, Director
Linda Bohrer, Director, Division of Market Regulation
Kevin Jones, General Counsel
Susan Schulte, Chief, Property & Casualty Section
Mark Doerner, Senior Counsel, P&C Section

(Others)
Michael Delaney, Hospital Services Group
Joseph Moody, Hospital Services Group
Hoyt Marquis, Aon
Andrew Teigen, Marsh
Jim Vaccarino (*via teleconference*) Marsh
Larry Case, Missouri Association of Insurance Agents
Fred Brown, Missouri State Medical Association
Keith Wenzel, Hendren & Andrae
Amy Hamacher, Missouri Insurance Coalition

The meeting was started at roughly 10:00 a.m. by Chairman Turley. First on the agenda was a short welcome by Scott B. Lakin, Director of the Missouri Department of Insurance, who thanked the members for taking the time out of their busy schedules to participate on the JUA's board of directors. He encouraged the members to think creatively and to question assumptions as they constructed the JUA. In the Director's view, ideally, the JUA should be a mechanism that enhances the functioning of the

[*] Material in brackets following the names of Board members indicate the insurance companies they work for and then the insurance industry trade groups which they are representing under Section 383.175, RSMo.

private insurance market, one which helps the system avoid the wild swings in premium rates seen by many doctors in recent years, (especially those in "high-risk" specialties).

Next, Kevin Jones, General Counsel for the Department gave the committee an overview of the state's "Sunshine Law," which establishes standards for open meetings and open records. He was followed by Mark Doerner, a Senior Counsel with the Department, who discussed the Department's recent investigations into the problems in the state's medical malpractice market, the Department's recent report for the Governor detailing its findings, and the recent public hearing at which the Department heard the testimony that ultimately led to the Director's July 24, 2003 determination that the formation of a Joint Underwriting Association for medical malpractice insurance was warranted.

Subsequently, the various board members and MDI staff discussed the issue of possible legislation on medical malpractice, including insurance reforms and tort reforms. There was common agreement that this is one of the most contentious issues currently being debated in the Missouri General Assembly.

Regarding the issue of how best to help the state's medical malpractice market, Karl Koch suggested that the Board consider an approach taken in some other states whereby the state entity provides carriers in the voluntary market with reinsurance for the largest, most actuarially volatile losses, thereby expanding the capacity of the voluntary market to write extra coverage. The board members generally agreed that this was an intriguing idea worthy of further consideration.

Don Ainsworth pointed to the Missouri Bar's "Bar Plan" as one example of a response to increasing premium rates which seems to have worked well, in that the Bar Plan has been able to avoid wild fluctuations in premiums while also providing advice on how to avoid professional malpractice. The subsequent discussion indicated that one historic problem with past medical malpractice reforms has been that the alternative insurance entities formed to address problems with the availability or affordability of medical malpractice coverage tend to eventually lose their client doctors in those "soft market" years when other carriers enter the Missouri marketplace with lower premium rates. In response to a question about whether a "doctor" plan or an "osteopath" plan would be viable, the audience indicated there are roughly 18,000 doctors in Missouri, 14,000 of whom are medical doctors and 4,000 of whom are osteopaths.

After breaking for lunch, the Board reconvened and the Chairman began working through a list of issues the MDI staff had prepared for the members, addressing the key problems initially facing the Board.

On the issue of whether Section 383.160, RSMo, subsection 1 presents a problem by requiring the JUA to issue traditional "occurrence" policies instead of the "claims-made" policies which are now the norm, both the Chairman and Dave Monaghan pointed out that the provision's requirement that the JUA's policies "…be written so as to apply to injury which results from acts or omissions *occurring* during the policy period" [emphasis added], is not, per se, a requirement for an "occurrence" policy. In fact, under

a claims-made policy, the act or omission must also *occur* during the policy period, the difference being the additional requirement that the act or omission also be *reported* during that period. In other words, the language in Section 383.160 RSMo is arguably applicable to both occurrence policies *and* claims-made policies.

Regarding the issue of the applicability of the requirement of the Sunshine Law to the Board, Dave Monaghan argued that the Board should not presume the application of the law was mandatory on the Board or the subsequent operations of the JUA, particularly its claims handling operations. Chairman Turley suggested that the relevant language in the Plan of Operation only go so far as to indicate that the Board would conduct itself under the "spirit" of the law.

Regarding another issue on the staff's list concerning which insurance trade organizations should be represented on the Board, the members concluded that the fact that two of the three entities (or their predecessors) mentioned under Section 383.175, RSMo, (i.e., the Alliance and the NAII) had recently merged was really an issue for the Director of the Department to worry about, not the Board; if the current make up of the Board was acceptable to the Director, they saw no major problem. The Board also endorsed the notion of allowing Board members to attend meetings by telephone teleconference; to the extent the rest of the public would also participate through the same mechanism, that was acceptable as well.

Regarding the draft Plan of Operation for the JUA prepared by the MDI staff, the members suggested a number of changes. In addition to language regarding the "spirit" of the Sunshine Law, the members suggested the Plan contain language:

1) Authorizing the Board to draft or approve the language of the policies issued by the JUA;
2) Authorizing the Board the authority to explore the reinsurance approach mentioned by Karl Koch;
3) Placing the responsibility under Section 383.155, RSMo, subsection 6, for "consulting" with affected individuals about the JUA's Plan of Operation on the Director or the Department, and not the Board;
4) Specifically discussing the issue of which "casualty" insurers and which lines of insurance were subject to assessment; and,
5) Allowing the JUA the authority to settle litigation *without* the approval of the health care provider.

The board spent considerable time discussion the issue of the level of indemnification available to the Board for its official actions; MDI staff agreed to look into the matter further. There was also some question as to whether there were different effective dates for the "Board" and the "JUA" under Chapter 383.

Finally, Chairman Turley asked the members to consider what type of entity they believed the JUA should be: a short term entity or a long term one, one which limited coverage to certain providers or one which would accept all applicants. After considerable discussion with Jim Vacarrino of Marsh (who manages JUAs in a number of

other states), the Board concluded that it was unlikely that the JUA could operate for the short-term only. In part, this is due to the fact that medical malpractice insurance is a long-tail line of coverage, but also because the state's three "crises" in the last three decades indicates the need for some form of permanent safety net. Regarding whether the JUA should adopt underwriting guidelines which would preclude coverage for certain providers, the consensus of the members was that the preferable approach was to make coverage available to all providers, but to appropriately "rate" them according to the risk presented. Having come to these conclusions, the Board members recognized they would likely need the assistance of an outside entity to manage and operate such a plan. It was suggested that the next meeting would focus on such outside vendors.